THE AVER ADVISORY

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presented by Aver Associates Estate Planners & Trustees

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TRUSTS

France's forced heirship rules do not constitute an essential principle under French law

In re: Estate of Maurice-Alexis Jarre, Paris Court of Appeal, May 11, 2016, Decision n° 14/26247

The erosion of France's legal and cultural opposition to trusts culminated last year with a landmark decision rendered by the Paris Court of Appeal, in a case involving the estate of French composer Maurice Jarre.

Facts. Jarre was born in France in 1924 and had been domiciled in California for about 40 years at the time of his death in 2009. He contributed his entire estate, including French real estate, to a trust established under California law. The sole beneficiary of the J Family Trust was Jarre's fourth wife Fong Khong, whom he married in 1984.

Jarre's children, who were excluded from receiving any inheritance, challenged their father's estate plan by invoking the *French Constitution*, the *European Convention on Human Rights*, provisions of the *French Intellectual Property Code*, and France's forced heirship rights—one of the deepest rooted pillars of French inheritance law.

Decision. The court confirmed that foreign trusts are valid and will produce their effects in France if constituted in conformity with the law applicable in their jurisdiction of origin. Furthermore, forced-heirship rules will not defeat a contribution made to that trust, provided that the contribution was not based on fraudulent motives.

The court ruled that forced heirship does not constitute an essential principle under French law and does not therefore benefit from the protection of French international public order. ■

INFORMATION EXCHANGE

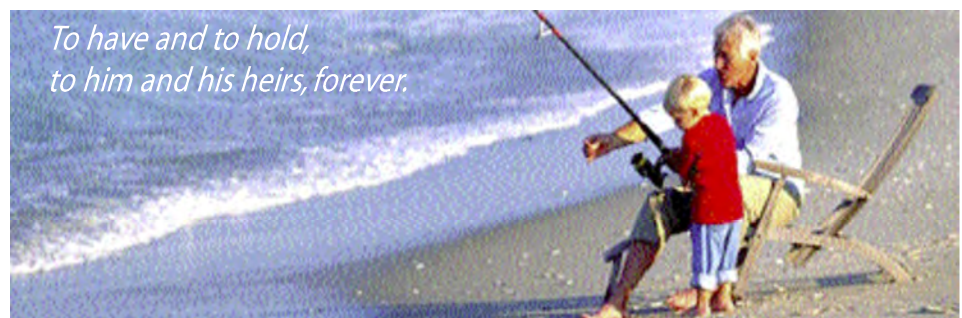
Swiss banks secure safeguards on information exchange

Dispatch on automatic exchange of information, Switzerland Federal Council, June 16, 2017

On June 16, 2017, Switzerland's Federal Council adopted the dispatch on the introduction of automatic exchange of financial account information with 41 states and territories. Information subject to exchange includes the clients' capital income and the account balance. Implementation is planned for 2018, and the first sets of data are scheduled to be exchanged in 2019.

During the consultation period, the Swiss Bankers Association lobbied for the inclusion of safeguards arguing that information "could fall into the wrong hands if passed to countries in regions such as South America or Africa where data protection standards can be weak". The SBA fears that some participating governments, or their officials, will leak Swiss bank account information to the media for political reasons. It also has concerns about criminal use of information and noted that data could be sold or used to put pressure on clients or their families.

In response to comments made during the consultation period, the federal decree requires that the Federal Council prepare a situation report before the first exchange of data. The report will investigate whether the certain governments satisfy requirements under the standard, especially those concerning confidentiality and data security. ■



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TAXATION

Spain called on to ensure its rules on foreign-held assets are proportionate
February infringements package, European Commission, Brussels, February 15, 2017

In February 2017, the European Commission sent a formal reasoned opinion to Spain requesting changes to the country's rules on assets held in other EU member states.

Spain's *Modelo 720* has been unpopular among both Spanish and foreign residents since it was introduced in 2012.

Spanish tax residents with assets overseas valued in excess of €50,000 are obliged to submit Form 720 annually. They face fines of €5,000 for each piece of missing or inaccurate information. Different penalties are payable for late submission.

Additionally, the assets located abroad would not be subject to any statute of limitations meaning that Spanish Tax Authorities would have an unlimited period to investigate the case.

The Commission launched an infringement procedure in November 2015 to ensure that the penalties for failure to comply are proportionate and similar to those which apply to income tax filing obligations.

While the Commission took the view that Spain has the right to require its taxpayers to provide authorities with information on certain assets held abroad, it concluded that the fines and penalties imposed for the non-submission or incorrect submission of information were disproportionate. Specifically, the EC concluded that:

i) The fines are much higher than penalties applied in a purely national situation.
ii) The rules may deter businesses and private individuals from investing or moving across borders in the single market.
iii) The rules are discriminatory and in conflict with the fundamental freedoms in the EU.

The Commission is waiting for a satisfactory response from the Spanish Government, failing which it may refer the issue to the Court of Justice of the EU. ■

DUAL RESIDENTS

Where you pay income tax is where you are tax resident (for income tax treaties)
McManus v. United States, 130 Fed. Cl. 613 (March 3, 2017)

Facts. John McManus filed a tax refund claim with the US Government in connection with a three-day backgammon match in the United States, which took place in 2012. McManus reported gambling winnings of $17.4 million. Before he was paid, $5.2 million was withheld and paid to the US Treasury. He sought a refund of the withheld amount.

McManus argued that in 2012, he was a resident of Ireland under Article 4 of the US-Ireland Income Tax Treaty. As such, his winnings were not taxable in the US (nor in Ireland). McManus admitted that he was not an Irish resident based on the number of days present in Ireland during the tax year, but rather because he paid Ireland's domicile levy in 2012—a fixed fee of €200,000 akin to a wealth tax. On his domicile levy form, McManus claimed to be an Irish domiciliary, while listing his address as Crans-Montana, Switzerland.

Decision. The court held that McManus was not an Irish tax resident under the Treaty. It noted that the domicile levy must be distinguished from income tax in that the levy applies regardless of whether the taxpayer is an Irish tax resident. McManus' argument for Irish residency was further weakened by the fact that he had not paid Irish income tax or capital gains tax since 1995. ■

ESTATE PLANNING

Monaco establishes regime for international successions
Monaco Law No. 1488, June 28, 2017

On June 28, 2017, Monaco adopted *Law No. 1488* establishing a national succession regime to apply to an estate regardless of the nature of the assets and their location. The law states that an international succession is governed by the law of the state in which the deceased had his domicile at the time of death.

In addition, a testator may now also elect that his succession be governed by the law of the state of his own nationality at the time of the election, provided application of the foreign law does not violate Monegasque public policy.

Finally, the law establishes that Monegasque courts have legal competence—regardless of the domicile of the defendant—if the succession is opened in Monaco or includes immovable property located in Monaco. ■

ASSET PROTECTION

Failure to prove residency in Florida undermines homestead exemption
Regina Ramos v. Amir H. Motamed, Case No. 502015CA012820 (Fla. Circuit Ct., June 20, 2017)

When Dr. Michael Motamed, a California resident, was sued for negligence following an automobile accident, he bought a $1.5 million condo in Palm Beach, Florida in an attempt to shelter his assets from his multi-million-dollar judgment creditor.

While Motamed obtained a Florida driver's license, library card and voter registration card, evidence at trial—including gym records indicating he worked out at his usual gym in California 300/365 days in 2015—demonstrated that he didn't actually move to Florida.

The court concluded that Motamed did not make his Florida condo his primary residence. Consequently, his condo was not protected by the Florida Constitution's homestead exemption from forced sales. ■

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TRUSTS

Trustee's discretionary power to distribute trust principal
Matter of Hoppenstein, Docket No. 2015-2918/A (NY County Surrogate's Ct, 03/31/2017)

A recent case in New York highlights the importance of proper construction of an estate plan using flexible drafting techniques tailored to the client's estate planning goals and objectives.

Facts. Reuben Hoppenstein created an irrevocable trust in 2004, which authorized the trustees "to pay such sums out of principal of the trust (even to the extent of the whole thereof) to the Settlor's descendants, living from time to time, in equal or unequal amounts, and to any one or more of them to the exclusion of others, as the Trustees, in their absolute discretion, shall determine."

At some point, the Settlor was unhappy with his daughter Cheryl Hoppenstein because he felt that her demands for money were excessive.

Pursuant to their discretionary power to distribute principal granted in the trust deed, the trustees distributed a life insurance policy from the 2004 Trust to a new trust in 2012.

The 2012 Trust was similar in all respects to the 2004 Trust, except that it excluded Cheryl and her descendants as beneficiaries.

The Settlor died in 2015 and proceeds of $10 million from the life insurance policy were paid to the 2012 Trust. Thereafter, Cheryl and her children sought to void the trustees' distribution of the insurance policy from the 2004 Trust to the 2012 Trust.

Decision. The court rejected all of Cheryl's arguments finding that the trust instrument expressly allowed the distribution In particular, the court noted that the New York decanting statute states that it should not be interpreted to limit a trustee's ability to decant when the trust grants such power. ■

CELEBRITY ESTATES

Court orders reconstitution of trust worth $200 million in long-running Crociani case
Crociani & O'rs v Crociani & O'rs, [2017] JRC146 (Jersey Royal Court 11 September 2017)

The Jersey Royal Court recently handed down its decision in a family feud involving a society princess, her film star mother and her estranged sister.

The case involved a series of claims related to a Bahamian trust known as the Grand Trust. The trust was originally settled in 1987 by film actress Edoarda Vesel Crociani, for the benefit of her daughters Cristiana and Camilla—now Princess Camilla de Bourbon des Deux Siciles—and their children. The trust was made up of a valuable portfolio of investments, various receivables and works of art, estimated to be worth about $200 million.

Facts. Edoarda was the widow of a wealthy Italian industrialist, Camillo Crociani, who had built up a successful engineering services business in Italy called Vitrociset SPA. Camillo died in 1980 when they were living in Mexico. Edoarda moved to New York with her young daughters and bought a large apartment on Fifth Avenue. She was contemplating taking up residence there and obtained advice from a US law firm.

The plaintiffs, Cristiana and her own two young daughters, claimed that they had been excluded from the benefits of the trust, which they perceived as having been diverted by Edoarda in secret in favour of Camilla.

The key issue was whether Edoarda was ever intended to benefit from the Grand Trust. An appointment of assets out of the trust was made in 2010 by the trustees, including BNP Paribas Jersey Trust Corporation. This appointment was made to a trust called the Fortunate Trust, of which Edoarda was not only the sole beneficiary during her lifetime, but over which she held extensive powers, including the power to revoke and to take the trust assets for herself.

Cristiana and her own young daughters sued as beneficiaries of the Grand Trust to reconstitute the trust fund for what had been paid away to her mother by the then trustees and for lost value since 2010.

Decision. The court noted that the provision of the Grand Trust, under which the 2010 appointment was made, expressly provided that such an appointment had to be "in favour or for the benefit of all or any one or more exclusively of the others or other of the beneficiaries (other than the settlor)…".

The court also considered certain aspects of the tax planning underlying the creation of the Grand Trust. Edoarda sought to avoid US federal income tax on the trust income by settling the trust before she took up US residence—a so-called "drop-off" trust. Key to the success of this tax plan was the requirement that Edoarda, as settlor of the Grand Trust, could not benefit in any way from the trust.

The Jersey Royal Court found in favour of the plaintiffs and ordered the reconstitution of the trust fund. ■

TAX RESIDENCY

Location of taxpayer's dog key factor in determining domicile
Matter of Blatt, DTA No. 826504 (NY Div. of Tax Appeals Feb. 2, 2017)

In *Matter of Blatt,* the taxpayer had lived and worked in New York for 17 years. He gradually transitioned to Dallas for a new job, only to return to New York two years later. The issue was whether Mr. Blatt was taxable as a New York resident during those two years.

Taking all of the circumstances to account, the court found that the location of the taxpayer's dog was the key factor in determining his domicile. It concluded that the significance of the taxpayer moving his dog to Dallas was reflected in his e-mail to a friend in which he said: "Dog is the final step that I haven't been able to come to grips with until now. So, Big D is my new home." ■